

Extended School Year Services
Technical Assistance Resource Document
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This document was developed by a workgroup that included staff at the Virginia Department of Education, local administrators, and parents of children with disabilities. This information was developed for the purpose of providing technical assistance by summarizing various case law decisions and interpretations of extended school year services. This summary is not regulatory, but rather is intended to provide guidance for addressing the legal requirement for extended school year services, if those services are needed for a student's free appropriate public education. This information may be provided to parents and used as a basis for ongoing personnel development.

What Extended School Year Services Are

The Individuals with Disabilities Education Act Amendments of 1997 (P.L. 105-17) provide that all students with disabilities are entitled to a free appropriate public education (FAPE). To have meaningful access to public education, students with disabilities may require services or types of educational programs that are different from those needed by other students since each student with a disability has unique learning needs. With this in mind, FAPE, for some students with disabilities, may require a program of special education and related services in excess of the normal school year.

In general, extended school year (ESY) refers to special education and/or related services provided beyond the normal school year of a public agency for the purpose of providing FAPE to a student with a disability. These services are distinct from enrichment programs, summer school programs, and compensatory services and are not simply an extension of time. ESY services are not so much a regression and recoupment issue as they are an issue of FAPE. Unrecouped regression, over time, may be evidence that FAPE is not being provided. In other words, it is not the case that a student is entitled to ESY services, but that the student will not receive FAPE if ESY services are not provided. These services, at no cost to the parent, will vary in type, intensity, location, inclusion of related services, and length of time, depending on the individual needs of the student. The consideration of ESY services is a part of the individualized education program (IEP) process.

The IEP, in accordance with the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, must have a statement of the projected dates for initiation of services and the anticipated duration of the services. Thus, any IEP that complies with this requirement already has a built-in mechanism to address whether services will last for ten months, twelve months, or any other period of time. The IEP must address the provision of ESY services, if required, in order for the student to receive FAPE.

ESY is not a separate planning process since it is part of the IEP process. Thus, an IEP meeting must be held to consider if a student needs ESY services and must be conducted like any other IEP meeting with appropriate prior notice. If seen as separate, it may lead to the segmentation of services for the student and further lead to situations where these services are considered or open to discussion for some students, but not for all. Therefore, a separate IEP should not be developed for ESY services; the current or an amended IEP should be used.

Factors to be considered when determining the need for ESY services include regression/recoupment, degrees of progress, emerging skills/breakthrough opportunities, interfering behaviors, the nature and/or severity of the disability, and other factors.

What Extended School Year Services Are Not

Because ESY services are uniquely designed to provide FAPE to students with disabilities, it is necessary to emphasize that these services are:

- **Not** based on the category of student's disability - services must be based on the student's unique educational needs;
- **Not** mandated twelve-month services for all students with disabilities;
- **Not** a child care service;

- **Not** necessarily a continuation of the total IEP provided to a student with a disability during the regular school year;
- **Not** required to be provided all day, every day, or each day;
- **Not** an automatic program provision from year to year;
- **Not** summer school per se, compensatory services, or enrichment programs;
- **Not** required to be provided in a traditional classroom setting; and
- **Not** a service to be provided to maximize each student's potential.

Historical Perspective of Extended School Year Services¹

Congress enacted the Education of All Handicapped Children's Act in 1975 to ensure that all children receive FAPE. In 1991, with the passage of the Individuals with Disabilities Education Act (IDEA), Congress reiterated that important standard. Incumbent in the provision of FAPE is the principle that education must be individualized to meet the unique needs of each child. In order to serve these needs, consideration must be given to the possible need for programs that extend beyond 180 school days per year or five and one half-hours per day.² Because each child's education is determined by an IEP, specific criteria for the determination of the need for ESY were not prescribed by IDEA. As school divisions and parents grappled with the issue of what constitutes FAPE, hearing officers and courts began to establish criteria, on a case by case basis, to be used to determine the need for extended year services in order to receive FAPE.

In the beginning, these criteria were narrow as the court looked to regression and recoupment data to determine a student's need for ESY services. In Rettig v. Kent City School District, 539 F. Supp.768 (N.D. Ohio 1981), affirmed in part, vacated in part on other grounds, 720 F.2d 464 (6th Cir. 1983), a federal district court in Ohio determined that, while a summer program would be beneficial for the student in question, the real issue was whether a summer school program was a necessary component of an appropriate education for the student. The Court then found that it would be appropriate if it would prevent significant regression. At the same time, Virginia's Eastern Federal District Court was coming to a similar conclusion. In Bales v. Clarke, 523 F. Supp.1366 (E.D. Va. 1981), the court found that the student was not entitled to year-round schooling without showing an irreparable loss of progress during the summer.³

¹The review of case law in this section highlights only the early court progression of judgment related to ESY services. This review is not meant to be an exhaustive review of cases but rather, to provide an overview of the early points of reasoning that helped shape the application of ESY.

²Some states initially had policies which limited services to 180 days per year. Courts in the eastern district of Pennsylvania, in the third and fifth circuits, ruled that services must be individualized for each child and, therefore, could not be limited to 180 days. See Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), cert. denied, 452 U.S. 968, 101 S.Ct. 3123, 69 L.Ed.2d 981 (1980) and Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983).

³For an additional federal court decision discussing a regression/recoupment standard, see Alamo Heights Independent School District v. Texas Board of Education, 709 F.2d 1153 (5th Cir. 1986).

The 1990's have seen a broadening of the criteria used to determine the need for extended year services. In Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990), the court found that when there is no empirical data available to demonstrate regression, the need for extended year services may be proven by expert opinion based upon a professional assessment. The Cordreys had requested that the court accept the findings of a federal district court in Hawaii that had enunciated five specific factors that should be considered in the determination of the need for extended year services. In addition to regression and recoupment factors, the court listed the following: *the nature of the student's disability, the severity of the student's disability and the areas of learning crucial to attaining the goal of self-sufficiency and independence from caretakers.* Lee v. Thompson, 80-0418 (D. Hawaii 1983)

While the Cordrey court did not specifically adopt the criteria requested by the parents, other courts began to look to these and other criteria. In Johnson v. Independent School District No. 4, 921 F.2d 1022, 1027 (10th Cir. 1990), the court ruled that in addition to regression and recoupment factors, the following factors must be considered: the probability of future regression, the degree of the child's impairment, the child's physical and behavioral problems, the parents' ability to provide education in the home, the availability of alternative resources, the child's rate of progress, the child's needs for interaction with nondisabled peers and vocational training, and whether the requested services are an integral part of a program for students with similar disabilities. The Fourth Circuit Court of Appeals then adopted similar factors in a Virginia case. In Lawyer v. Chesterfield County, 3:92CV760 (E.D. Va. 1993), the parents requested continuous speech and language services for their son with autism. The court found that because communication was critical to the student's behavior and to his future vocational needs coupled with the fact that there was a small, but vital, window of opportunity in which the student could effectively learn, the student must have uninterrupted speech language therapy in order to receive FAPE.

In another federal case regarding ESY, the United States District Court in Maryland, in Reusch v. Fountain, 872 F. Supp. 1421 (D. Md. 1994), required that Maryland begin using a variety of nonregression-based factors, including emerging skills and breakthrough opportunities, in determining the need for ESY. In addition, the court stated that the practice of encouraging parents to enroll their children in summer enrichment programs did not qualify as extended year services because these services were not individualized, were not IEP-based, and were not free. Consideration must also be given to the provision of services in the least restrictive environment (LRE).

What began in the 1970's as a disagreement over whether school divisions must consider a school year of more than 180 days for those students who need additional services in order to receive educational benefit, has become an acknowledgment that ESY services must be a necessary part of the provision of FAPE. Additionally, regression/recoupment is no longer the only criterion to be used in determining the need for or denial of such services. School divisions must consider ESY services for all students with disabilities and provide individualized services to students who need them.

Determining The Need For Extended School Year Services

Determining the need for ESY services must be presented in the context of the IEP process and completed at an IEP meeting. The IEP team should consider the need for these services at least annually, but must consider the need for these services if so requested. The request to consider ESY services may be initiated by the parent, the student, the student's teacher(s), related service providers, or administrators. The consideration for ESY services should be an integral part of any IEP meeting, including the initial IEP meeting.

Procedures

Any procedures used by a local school division to assist the IEP team in determining the need for ESY services:

- must prohibit the postponement of the decision by the IEP team regarding ESY services until after the summer in order to gather data or to determine what would happen if the services were not provided;
- should allow the decision by the IEP team regarding ESY services to be made early enough to ensure that the parents can meaningfully exercise their due process rights if they wish to challenge an ESY decision;
- must ensure that the individual needs of the student are addressed and that the nature of the services provided will vary based upon those needs;
- must not prelimit the ESY services to a set number of days, hours of service, nor restrict the provision of ESY services for administrative convenience;
- must not allow the availability of ESY services to be limited by the financial resources of the school division;
- must not allow the denial of ESY services to those students who need the services in order to receive FAPE; and
- must not limit ESY services to predetermined disability categories nor categorically exclude certain students with disabilities.

Factors to Be Considered by the IEP Team

When determining the need for ESY services by the IEP team, decisions should always occur retrospectively or prospectively based upon the unique needs of the student. Decisions are made to ensure that the student is provided FAPE. Thus, the decision is based upon data and discussions by the IEP team and not determined solely by any formula, including a regression/recoupment formula. Factors that the IEP team should consider in making its decision are listed below. Any of these factors, alone or in combination, can trigger the need for ESY.

- Regression/Recoupment - The IEP team determines whether without these services, there is a likelihood of substantial regression of critical life skills caused by a school break and a failure to recover those lost skills in a reasonable time following the school break (e.g., six to eight weeks after summer break).
- Degree of Progress - The IEP team reviews the student's progress toward the IEP's goals on critical life skills and determines whether, without these services, the student's degree or rate of progress toward those goals, objectives or benchmarks will prevent the student from receiving benefit for his/her educational placement during the regular school year.
- Emerging Skills/ Breakthrough Opportunities - The IEP team reviews all IEP goals targeting critical life skills to determine whether any of these skills are at a breakthrough point. When

critical life skills are at this point, the IEP team needs to determine whether the interruption in services and instruction on those goals, objectives or benchmarks by the school break is likely to prevent the student from receiving benefit from his/her educational program during the regular school year without these services.

- Interfering Behaviors - The IEP team determines whether without ESY services any interfering behavior(s) such as ritualistic, aggressive or self-injurious behavior(s) targeted by IEP goals have prevented the student from receiving benefit from his/her educational program during the school year. The team also determines whether the interruption of programming which addresses the interfering behavior(s) is likely to prevent the student from receiving benefit from his/her educational programming during the next school year.
- Nature and/or Severity of the Disability - The IEP team determines whether, without ESY services, the nature and/or severity of the student's disability is likely to prevent the student from receiving benefit from his/her educational program during the regular school year.
- Special Circumstances or Other Factors - The IEP team determines whether, without ESY services, there are any special circumstances that will prevent the student from receiving benefit from his/her education program during the regular school year. Other factors cited in cases include:
 - ability of the child's parents to provide the educational structure at home;
 - ability of the child to interact with children without disabilities; and
 - areas of the child's curriculum which need continuous attention.

In looking at the factor of regression and recoupment, the following discussion questions may help the IEP team:

- Does the student need extensive review to demonstrate previously learned skills?
- What inconsistencies does the student demonstrate in mastered or partially acquired skills?
- Has the student reached a critical point of instruction or behavior management where a break in programming would have serious, detrimental effects?
- Does the student demonstrate behaviors or deficits that would cause regression if breaks in programming occur?
- Is there a degenerative medical condition that might cause regression?
- Will a break in programming jeopardize the student's placement in the LRE?

It is important to note that the IEP team is not required to demonstrate previous student regression before ESY services are provided. If no empirical data are available on regression, then the need may be shown by expert opinion or prospective criteria established by the IEP team. This decision should be based upon an examination that includes, but is not limited to the following:

- review of the current IEP goals, objectives or benchmarks;
- observation and data from teachers, therapists, parents, and others having direct contact with the student before and during breaks in educational programming;

- data and observations regarding the student's performance after long weekends, vacations, and past summer breaks;
- assessment of information maintained on the student, including pretest and post-test data; and
- curriculum-based assessment, including pretest and post-test data; and other relevant factors.

ESY services should not be granted solely on the basis of the student not achieving one or more of the IEP's goals, objectives or benchmarks. The determination must be based on those services needed in order for the student to receive FAPE. Thus, the IEP team must also review and consider the need for any related services including transportation. If related services are necessary for the student to benefit from the special education services provided during the ESY, then they must be provided. If a student needs only related services as the ESY, then they should be provided. When the IEP team is determining whether a student needs ESY services, they may use the following types of information:

- historical data;
- review of current and previous IEPs;
- documented regression and recoupment time;
- documented clinical evidence;
- classroom observation;
- progress notes;
- standardized tests;
- samples of the student's work;
- behavior logs;
- parent interviews;
- attendance information;
- other objective evidence; and
- expert opinions.

What The Services Can Look Like

The requirement regarding placement in the least restrictive environment (LRE) during the normal school year applies to ESY services. The placement should be based upon the IEP. There may be instances where a summer placement might further isolate the student. If this is the case, the IEP team should consider whether an alternative is more appropriate for the student. How services will be delivered is determined by the IEP team and flexibility in the delivery of services can be considered if it fulfills the needs of the student. While the school division must consider LRE, it is not required to create artificial LRE settings during the summer months to meet the LRE requirement.

Qualified personnel must provide ESY services. It is recommended that the staff, which provides ESY services, submit a report regarding the student's progress to the student's teacher(s) for the coming school year. As best practice, progress could also be indicated on the student's IEP.

Examples include:

- the teacher and parent working together (materials could be sent home with progress periodically monitored by the teacher);
- learning packages with staff monitoring;

- home-based programs;
- grouping students with similar goals;
- school-based programs;
- cooperative programs with other agencies;
- multi-system shared programs;
- contractual arrangements with service providers or agencies;
- community-based programs; and
- vocational settings.

The IEP team should document all options considered. This includes the justification of those chosen and those rejected.

Special transportation is a related service and must be offered if it is necessary for the student to benefit from special education and related services.

The Process - The IEP Meeting

At an IEP meeting, at least annually, there should be a determination if a student with a disability needs ESY services in order to receive FAPE. The IEP team should consider all factors in its discussion. All decisions and the basis for the decisions should be documented and communicated to the parent and student if appropriate.

Remember, the question is: “Does the student need ESY services in order to receive FAPE”?

IF YES:

- Identify the specific goals(s), objectives or benchmarks from the current IEP that require services since all goals may not be affected;
- Determine the type(s), amount(s) and duration of the special education and/or related services required based upon the goals(s) identified (the amount, type and duration may differ for each identified service if more than one service is required). Do not forget to address any needed related services which also might include transportation. Decisions regarding services must be based upon the student’s need and not on existing programs;
- Determine the LRE in which the specific goal(s) will be addressed (Note: Schools are not required to establish summer programs for nondisabled students for the sole purpose of satisfying the LRE requirements for students receiving ESY [OSEP Policy Letter 8/30/89 (EHLR 213:215)]);
- Determine participation with peers without disabilities; and
- Determine the person(s) responsible for providing services (i.e., special education teacher, speech/language pathologist, physical therapist, etc.).

IF NO:

- Provide the parents with written notice as required in state and federal regulations.

Some parents will decide not to have their child participate in ESY services. School personnel should document this parental request and have the parent sign it.

Definitions Associated with Extended School Year Services**Critical Life Skills:**

A critical life skill includes any skill determined by the IEP team to be critical to the student's overall educational progress, including social and behavior skills.

Degree of Progress:

The IEP team must review the expected degree of progress on any IEP goals and objectives targeting critical life skills, and determine whether, without ESY services, the student's degree of progress on those IEP goals and objectives is likely to prevent the student from receiving some educational benefit from his/her educational program during the regular school year.

Emerging Skills/Breakthrough Opportunities:

The IEP team determines whether any IEP goals and objectives targeting critical life skills are at a breakthrough point. At this point, the IEP team determines whether the interruption of instruction on the critical life skills caused by the school break is likely to prevent the student from receiving some educational benefit from his/her educational program during the regular school year without ESY services.

Extended School Year Services:

ESY services mean an individualized extension of specific special education and/or related services beyond the regular school year provided in order for the student to receive FAPE in accordance with his/her IEP.

Interfering Behaviors:

The IEP team determines whether any interfering behaviors, such as stereotypic, ritualistic, aggressive, or self-injurious behavior(s), targeted by the IEP's goals and objectives would have prevented the student from receiving some benefit from his or her educational program during the regular school year. The IEP team also determines whether the interruption of programming for this (these) interfering behavior(s) is (are) likely to prevent the student from receiving some benefit from his or her educational program without ESY services.

Regression/Recoupment:

The IEP team determines whether, without ESY services, there is a likelihood of substantial regression of critical life skills caused by the school break that would result in the failure to recover those lost skills in a reasonable time following the school break.

Regression:

Regression, for the purpose of this document, is a substantial loss of any critical life skill. Some degree of loss in skills typically occurs with all students during normal school breaks and would not be considered substantial.

Recoupment (Recovery):

Recoupment is the ability to recover a loss of skills in a reasonable time following a normal school break. Most students without disabilities recoup skills within six to eight weeks.

Reasonable recoupment rates vary among individuals based upon individual learning styles and rates. Accordingly, some students with disabilities may require more than six to eight weeks to recuperate.

Summer School:

In contrast to ESY services, summer school programs are optional and voluntary programs that provide enrichment, remedial and reinforcement activities, or address new skills. Summer school is not required for the provision of FAPE. ESY services could be provided in combination with existing summer school programs if such programs are available and are appropriate for the individual student.